PUBLICATION INFORMATION:

Bergdale v. Uni-Select USA Inc., 2002 WL 1362229 (N.D. Iowa May 28, 2002) (Unpublished decision)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARIA BERGDALE, Plaintiff, vs. UNI-SELECT USA INC. f/k/a AUTOMOTIVE NORTHERN WAREHOUSE, INC., Defendant.	No. C00-3069-MWB **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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This matter comes before the court on the defendant's motion for summary judgment. (Doc. No. 17). The underlying action in this employment discrimination case involves plaintiff's claims of the defendant's failure to accommodate the plaintiff's alleged disability, retaliation for filing employment discrimination charges, discharge in violation of public policy, and intentional infliction of emotional distress. The questions presented on this motion are refreshingly streamlined; the defendant contends that judgment should be entered against the plaintiff and in favor of the defendant as a matter of law on each of the plaintiff's claims for the following reasons: (1) the defendant asserts that the plaintiff is not disabled within the meaning of the Americans with Disabilities Act and, therefore, that the plaintiff's ADA claims must fail; (2) the defendant asserts that the timing between the plaintiff's protected activities and her constructive discharge is, as a matter of law, too remote to establish causation; (3) the defendant contends that the plaintiff cannot overcome the defendant's stated legitimate reasons for its employment decisions; and (4) the defendant argues that the plaintiff's common-law wrongful discharge claim is preempted by her statutory retaliation claim. The plaintiff, of course, refutes these assertions and contends she has generated a jury question on each of her claims.

I. INTRODUCTION

A. Procedural Background

This lawsuit was filed in federal court on August 28, 2000. Jurisdiction is proper pursuant to 28 U.S.C. § 1331 (federal question), as well as under the Americans With Disabilities Act ("ADA"), 42 U.S.C.§§ 12117(a), 2000e-5(f)(3). Jurisdiction over the plaintiff's state-law claims is also proper pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction). In addition, this litigation is timely, because the plaintiff brought this suit within the prescribed 90 days after having received her right-to-sue letters from the Equal Employment Opportunity Commission, the Iowa Civil Rights Commission, and the Mason

City Human Rights Commission, received July 5, 2000, June 21, 2000, and June 5, 2000, respectively. Before the court is the defendant's motion for summary judgment, filed pursuant to Federal Rule of Civil Procedure 56. The court heard oral arguments on this motion on May 15, 2002. Counsel were thoroughly prepared and provided helpful input. The defendant was represented at these arguments by Douglas Phillips, of Klass Stoik Mugan Villone & Phillips, L.L.P., Sioux City, Iowa. The plaintiff was represented by Mark D Sherinian, of the Sherinian & Walker Law Firm, West Des Moines, Iowa, as well as by Jackie Armstrong, of Brown, Kinsey & Funkhouse, P.L.C., Mason City, Iowa.

B. Disputed And Undisputed Facts

This litigation stems from the following events, which the plaintiff describes as "a long series of discriminatory refusals to accommodate [her] disability." [Pltf.'s Br., at 5]. The factual and procedural background of this case can be summarized in a fairly succinct manner because there are very few disputed facts. The plaintiff, Maria Bergdale ("Bergdale") began her employ with the defendant, Uni-Select USA, Inc. ("Uni-Select") in 1996. At Uni-Select, Bergdale worked primarily as a materials handler, which entailed filling customer orders–or "picking"–and shelving merchandise–or "stocking"–in the warehouse. In April of 1998 and in July of 1998, Bergdale sustained two distinct work-related injuries. The April of 1998 injury occurred to her left knee, while the July of 1998 injury occurred to her right foot. Both injuries ultimately necessitated surgery and resulted in permanent work restrictions. Moreover, Bergdale applied for and receive workers' compensation benefits for these injuries.

During the months following Bergdale's injuries, Bergdale sought the care of, among others, Dr. Michael Toth, a physician selected by Uni-Select. In addition, she consulted Dr. Donna Bahls in July of 1999 and Dr. Dennis Kessler, Bergdale's surgeon, in November of 1999 in order to receive releases to work. Lastly, Bergdale consulted Kate Schrot, a

rehabilitation consultant, in connection with this litigation and received a more comprehensive employability analysis than that provided by Dr. Bahls and by Dr. Kessler.

Bergdale alleges that her physical limitations affect her ability to walk, stand, lift, and work. Her limitations consist of the following:

> I have a damaged left knee and right foot which prohibits me from the major life activities of lifting, walking and standing for substantial lengths of time. These work injuries caused an altered gait which aggravated my right hip. My major life activitity of working has been impacted as I am precluded from the classes of jobs that require lifting, walking and standing beyond my medical restrictions.

[Deft.'s App. D, at D-2, quoting Bergdale Interrogatory No. 12].

While Uni-Select does not dispute Bergdale's allegations regarding her physical limitations for purposes of this motion,[1] Uni-Select contends that Bergdale's restrictions fail to meet the definition of a disabililty because, in Uni-Select's opinion, "no major life activity is implicated and there is no substantial limitation as defined by the Court in *Toyota* [*Motor Manufacturing v. Williams*, 534 U.S. 184 (2002)]." [Deft.'s Br., at 7].

After Bergdale sustained her work-related injuries, she was unable to continue her position picking and stocking because of her physical limitations. As a result, Bergdale applied for openings within the company that would have been physically feasible for her. Namely, Bergdale applied for a receptionist position in November of 1998. Candi Woods,

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[1]Uni-Select did not specifically concede nor accept as true these allegations. Nevertheless, Uni-Select's argument on this Motion For Summary Judgment proceeds on the ground that these claimed limitations are insufficient to rise to the level of a disability within the meaning of the ADA. Furthermore, counsel for Uni-Select reiterated at oral arguments on this motion that these allegation by Bergdale do not constitute a disability. Therefore, the court will treat as true for the limited purposes of this ruling on the defendant's Motion For Summary Judgment, that Bergdale's allegations that the above-quoted restrictions are true.

however, was hired to fill this position. In January of 1999, Candi Woods was promoted to office manager, and the receptionist position opened up once again. Bergdale applied anew, but on this occasion Uni-Select hired Angela Eldridge. In addition to the receptionist positions, Bergdale requested a transfer to one of four "returned goods" positions, which she felt would accommodate her physical limitations. However, Uni-Select denied the transfer. Moreover, Bergdale contends that other positions that she could have performed became available during her tenure at Uni-Select-Select but that she was not informed of their availability and, therefore, did not apply.

Bergdale claims that she was constructively discharged on November 22, 1999. For purposes of this motion, Uni-Select does not dispute this allegation. On November 18, 1999, Dr. Kessler released Bergdale to work full-time. However, even though Dr. Kessler released Bergdale to work, he imposed certain permanent restrictions, including a "two on one off" schedule. This work schedule entailed one hour of sit-down work for each two hours of standing. These restrictions precluded Bergdale from returning to her former position as a picker in the warehouse.

After leaving Dr. Kessler's office, Bergdale went directly to Uni-Select in uniform and prepared to work. She presented her permanent restrictions to Bob Koren ("Koren"), a manager at Uni-Select and Bergdale's supervisor. On November 18, 1999, Koren offered Bergdale a part-time—six hours per day—position in the catalog department. Because this position did not provide for benefits, Bergdale requested full-time work. Specifically, she proposed a schedule that supplemented the six hours in the catalog position with two hours of office work. According to Bergdale, Koren advised her that he would look into the feasability of this suggestion and that he would make a decision the following day. Not having gotten a response from Koren, however, Bergdale returned to Uni-Select on November 22, 1999, again prepared to work. Instead, she was informed by Candi Woods that Koren was out of the office on vacation and that the catalog position was no longer

available to Bergdale. It was at this time that Bergdale determined that Uni-Select did not want her to return to work, and she concluded she had effectively been constructively discharged.

II. DISCUSSION

A. Standards For Summary Judgment

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in a number of prior decisions. *See, e.g., Swanson v. Van Otterloo,* 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.*, 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill*, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. # 1 v. City of Sioux Ctr.*, 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997), *aff'd in pertinent part*, 202 F.3d 1035 (8th Cir.), *cert. denied*, 531 U.S. 820 (2000); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 817-18 (N.D. Iowa 1997), *aff'd*, 205 F.3d 1347 (8th Cir. 2000) (Table op.); *Security State Bank v. Firstar Bank Milwaukee, N.A.*, 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); *Lockhart v. Cedar Rapids Cmty. Sch. Dist.*, 963 F. Supp. 805 (N.D. Iowa 1997). The essentials of these standards for present purposes are as follows.

1. Requirements of Rule 56

Rule 56 itself provides, in pertinent part:

> Rule 56. Summary Judgment
> . . . .
> (b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.
> (c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,*

> *together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law*.

Fed. R. Civ. P.. 56(a)-(c) (emphasis added).

Applying these standards, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87(1986)). As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *accord Rouse v. Benson*, 193 F.3d 936, 939 (8th Cir. 1999); *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); *Hartnagel*, 953 F.2d at 394.

2. The parties' burdens

Procedurally, the moving party bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue." *Hartnagel*, 953 F.2d at 395 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see also Rose-Maston v. NME Hospitals, Inc.*, 133 F.3d 1104, 1107 (8th Cir. 1998); *Reed v. Woodruff County*, 7 F.3d 808, 810 (8th Cir. 1993). "When a moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Instead, the party opposing summary judgment is required under Rule 56(e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a

genuine issue for trial." FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324; *Rabushka ex. rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998); *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995). If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is "entitled to judgment as a matter of law." *Celotex Corp.*, 477 U.S. at 323; *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Quick*, 90 F.3d at 1377 (same).

3. Summary judgment in employment discrimination cases

Because this is an employment discrimination case, it is well to remember that the Eighth Circuit Court of Appeals has cautioned that "summary judgment should seldom be used in employment-discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991); *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989)); *see also Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997) (citing *Crawford*); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 615 (8th Cir. 1997) (quoting *Crawford*); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 862 (8th Cir. 1997) ("We must also keep in mind, as our court has previously cautioned, that summary judgment should be used sparingly in employment discrimination cases," citing *Crawford*); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997) (quoting *Crawford*); *Hardin v. Hussmann Corp.*, 45 F.3d 262, 264 (8th Cir. 1995) ("[S]ummary judgments should only be used sparingly in employment discrimination cases.") (citing *Haglof v. Northwest Rehabilitation, Inc.*, 910 F.2d 492, 495 (8th Cir. 1990); and *Hillebrand*, 827 F.2d at 364). Summary judgment is appropriate in employment discrimination cases

only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." *Johnson*, 931 F.2d at 1244; *see also Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 148 (8th Cir. 1995) (quoting *Johnson*, 931 F.2d at 1244); *Crawford*, 37 F.3d at 1341 (quoting *Johnson*, 931 F.2d at 1244). To put it another way, "[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." *Crawford*, 37 F.3d at 1341 (holding that there was a genuine issue of material fact precluding summary judgment); *accord Snow*, 128 F.3d at 1205 ("Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant.") (citing *Crawford*, 37 F.3d at 1341); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 486 (8th Cir. 1996) (citing *Crawford*, 37 F.3d at 1341); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (quoting *Crawford*, 37 F.3d at 1341); *Johnson*, 931 F.2d at 1244.

Nevertheless, the Eighth Circuit Court of Appeals also observed that "[a]lthough summary judgment should be used sparingly in the context of employment discrimination cases, *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994), the plaintiff's evidence must go beyond the establishment of a prima facie case to support a reasonable inference regarding the alleged illicit reason for the defendant's action." *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir. 1995) (citing *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 365 (8th Cir. 1994)); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1134 (8th Cir.) (observing that the burden-shifting framework of *McDonnell Douglas* must be used to determine whether summary judgment is appropriate), *cert. denied*, 528 U.S. 818 (1999). More recently, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court reiterated that "'[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Reeves*, 530 U.S. at 142 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450

U.S. 248, 253 (1981)).[2] Thus, what the plaintiff's evidence must show, to avoid summary judgment or judgment as a matter of law, is "'1, that the stated reasons were not the real reasons for [the plaintiff's] discharge; and 2, that age [or race, or sex, or other prohibited] discrimination was the real reason for [the plaintiff's] discharge." *Id.* at 153 (quoting the district court's jury instructions as properly stating the law). The Supreme Court clarified in *Reeves* that, to meet this burden, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. The court will apply these standards to Uni-Select's motion for summary judgment, addressing each of the disputed issues in turn.

B. Bergdale's Disability Claims

Bergdale asserts a failure-to-accommodate claim and a retaliation claim under both the Americans With Disabilities Act ("ADA" or "Act"), 42 U.S.C. § 12101 *et seq*. and chapter 216 of the Iowa Civil Rights Act ("ICRA"). As a preliminary matter, it should be noted that in considering Bergdale's discrimination claims, the court will generally make no distinction between claims based on federal law and comparable claims based on state law. This is appropriate because the Iowa Supreme Court has recognized that federal precedent is applicable to discrimination claims under the ICRA, IOWA CODE CH. 216. *See Fuller v. Iowa Dep't of Human Servs.*, 576 N.W.2d 324, 329 (Iowa 1998) (recognizing that Chapter 216's prohibition on disability discrimination is the state-law "counterpart" to the

[2] In *Reeves*, the Supreme Court was considering a motion for judgment as a matter of law after a jury trial, but the Supreme Court also reiterated that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves*, 530 U.S. at 150 (quoting *Liberty Lobby, Inc.*, 477 U.S. at 250-51). Therefore, the standards articulated in *Reeves* are applicable to the present motion for summary judgment.

ADA, and that, "[i]n considering a disability discrimination claim brought under Iowa Code chapter 216, we look to the ADA and cases interpreting its language. We also consider the underlying federal regulations established by the Equal Employment Opportunity Commission (hereinafter 'EEOC'), the agency responsible for enforcing the ADA.") (internal citations omitted); *cf. Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999) ("The ICRA was modeled after Title VII of the United States Civil Rights Act). Iowa courts, therefore, traditionally turn to federal law for guidance in evaluating the ICRA. *King v. Iowa Civil Rights Comm'n*, 334 N.W.2d 598, 601 (Iowa 1983). Federal law, however, is not controlling. Iowa courts look simply to the analytical framework utilized by the federal courts in assessing federal law, and federal courts should not substitute the language of the federal statutes for the clear words of the ICRA. *Hulme v. Barrett*, 449 N.W.2d 629, 631 (Iowa 1989); *accord Board of Supervisors of Buchanan County v. Iowa Civil Rights Comm'n*, 584 N.W.2d 252, 256 (Iowa 1998) ("In deciding gender discrimination disputes, we adhere to the Title VII analytical framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25, 36 L. Ed. 2d 668, 677-79 (1973). *See Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 516 (Iowa 1990).").

Under the ADA, discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]." 42 U.S.C. § 12112(b)(5)(A). To establish a *prima facie* case of discrimination under the ADA, Bergdale must show (1) she has a disability within the meaning of the ADA, (2) she is qualified to perform the essential functions of her job, with or without reasonable accommodation, and (3) she suffered an adverse employment action because of her disability. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1135 (8th Cir. 1999) (en banc). Likewise, to establish a

prima facie case of ADA retaliation, Bergdale must show "[(1)] participation in a protected activity, [(2)] subsequent adverse action by the employer, and [(3)] a causal connection between the two." *Sims v. Sauer-Sundstrand Co.*, 130 F.3d 341, 343 (8th Cir. 1997) (citing *Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98, 100 (8th Cir. 1995)). And while Bergdale will ultimately have to prove each of these elements at trial, at issue in this motion for summary judgment is solely the first element of her disability discrimination claim—whether Bergdale is disabled within the meaning of the Act.

The ADA defines a "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The recent Supreme Court case *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184, 122 S. Ct. 681 (2002), governs the analysis of whether Bergdale's limitations rise to the level of a "disability" within the meaning of the ADA. The Equal Employment Opportunity Commission ("EEOC") has issued regulations defining the three elements of disability contained in subsection A. *See* 29 C.F.R. § 1630.2 (2002). "Physical or mental impairment" is defined as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." *Id.* § 1630.2(h)(1). "Major Life Activities" are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 1630.2(i). In *Toyota*, the Court explained that "'[m]ajor life activities' . . . refers to those activities that are of central importance to daily life." *Id.* at ___, 122 S. Ct. at 691.

The ADA's "substantially limits" requirement indicates that an impairment must interfere with a major life activity "'considerabl[y]' or 'to a large degree." *Id.* at ___, 122

S. Ct. at 691. Because she can walk without assistance, work so long as she adheres to her "two on one off" requirement, breathe without difficulty, learn new tasks, and care for her daily living needs, Uni-Select asserts that none of Bergdale's major life activities is implicated. Further, Uni-Select points to Bergdale's employment record since her separation from Uni-Select as evidence that she is not disabled.

Bergdale has been employed since her separation from Uni-Select: she worked for the Mason City Community School District from December of 1999 through October of 2000 as a teacher's aide, a bus aide, a secretary, and as a food server, and, she currently is a pricing coordinator for a grocery store. Still, her physical restrictions preclude her from a large category of jobs. Specifically, her restrictions can be summarized as follows:

> As the result of an injury to her left knee and right ankle, the medical providers have given Ms. Bergdale permanent physical restrictions. She is limited to light work and must sit down one hour for every two hours she is on her feet. Despite many transferable skills and extensive work experience, these permanent restrictions prevent Ms. Bergdale from performing her past work and prevent her from working in other categories of jobs including manufacturing positions such as assembler and machine operator, positions in retail trade such as sales clerk and cashier and positions in the food service, restaurant and hotel industries such as waitress, hostess and cook.

[Pltf.'s App., at 7-8]. These restrictions foreclose Bergdale from employment "that is performed at a physical demand level of greater than light work. In some cases it would eliminate some categories of light work if they did not allow for the need to sit for 1 hour after standing/walking for two hours." [Pltf.'s App., at 7-6].

At minimum, Bergdale has generated genuine issues of material fact as to whether her physical impairments rise to the level of a disability within the meaning of the Act. *Cf. Webner v. Titan Distribution, Inc.*, 267 F.3d 828 (8th Cir. 2001) (limitations on walking, standing, lifting, and twisting created jury question with respect to whether ADA claimant

was disabled); *Kells v. Sinclair Buick-GMC Truck, Inc.*, 210 F.3d 827, 830 (8th Cir. 2000) (limitations on walking recognized as a disability); *Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1207 (8th Cir. 1997) (holding that a lifting restriction *alone* does not create a triable dispute regarding a substantial limitation on a major life activity); *Webner v. Titan Distribution, Inc.*, 101 F. Supp. 2d 1215, 1221 (N.D. Iowa 2000), *aff'd in pertinent part*, 267 F.3d 828 (8th Cir. 2001) (limitations on claimant's standing, bending, twisting sufficient to create jury question).

Bergdale has also alleged that she not only is "actually disabled," but also is "perceived as" disabled and has a history of disability. While the court finds that there is more than sufficient evident from which a reasonable jury could conclude that Bergdale was actually disabled within the meaning of the Act, the court finds that Bergdale has generated genuine issues of material fact with respect to these allegations as well.

C. Timing: Retaliation And Wrongful Discharge Claims

Bergdale also contends that Uni-Select's alleged failure to accommodate her physical restrictions and her subsequent discharge were in retaliation for her filing discrimination charges. To prevail on this claim, Bergdale must prove: (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) a causal connection exists between her protected activity and the adverse employment action. *Stricker v. Cessford Const. Co.*, 179 F. Supp. 2d 987, 1011 (N.D. Iowa 2001) (citations omitted).

Bergdale also asserts a state-law claim of wrongful discharge in violation of public policy. In particular, Bergdale asserts she was constructively terminated for pursuing workers' compensation benefits. Iowa courts recognize this cause of action. *See, e.g.*, *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 686 (Iowa 1990) (recognizing discharge in retaliation for pursuing rights under Iowa workers' compensation laws violates public policy and gives rise to common-law cause of action); *Niblo v. Parr Mfg., Inc.*, 445

N.W.2d 351, 353 (Iowa 1989) (same); *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560-61 (Iowa 1988) (same). The elements of this claim include a showing of: "(1) engagement in a protected activity, (2) adverse employment action, and (3) a causal connection between the two." *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 299 (Iowa 1998).

At issue on this motion for summary judgment is solely the "causal connection" element. Thus, even though Bergdale's statutory retaliation and wrongful discharge claims are discrete, the court will combine its treatment of these claims because the analysis of the causation elements is, for all intents and purposes on this motion, the same. Uni-Select contends that the timing between Bergdale's protected activity and the adverse actions she alleges were unlawful is too remote to establish causation. However, the court disagrees and finds that Bergdale has generated genuine issues of material fact from which a jury could conclude that her protected activity was the motivating factor behind her constructive discharge or behind Uni-Select's alleged failures to accommodate. The court, therefore, will deny Uni-Select's motion for summary judgment as to both Bergdale's statutory retaliation and common-law wrongful discharge claims.

The court recognizes that a significant period of time lapsed occurred between filing for workers' compensation benefits and her constructive discharge—in fact, over one year and one-half passed between Bergdale's first injury and her constructive discharge in November of 1999. However, Bergdale's evidence on this element consists of more than timing alone. She also has presented undisputed evidence of animus towards workers' compensation claimants by her manager at Uni-Select, Koren. Koren admittedly was skeptical of Bergdale's injuries. Namely, he did not believe they were truly work-related. Furthermore, Bergdale contends that, when applying for a receptionist position, Koren told her that she would have to go through a battery of physical tests if she were to get the position in order to insure that she did not make a false claim for workers' compensation

benefits for carpal tunnel syndrome. In addition, Bergdale has presented evidence of destruction or alteration of evidence and failures to accommodate her restrictions, from which a reasonable juror could infer a causal link between her workers' compensation claims and her discharge. Under these circumstances, the timing of Bergdale's discharge is not, at this stage of the proceedings, fatal to her claim of wrongful discharge in violation of public policy.

D. Proffered Legitimate Reason

Uni-Select also contends that Bergdale's retaliation for filing disability charges claim fails as a matter of law because Bergdale cannot overcome Uni-Select's stated reason for the employment decisions that were made. "In considering retaliatory discharge claims, [the Eighth Circuit] use[s] the three-stage order of proof and presumptions governing discrimination cases in general." *Jackson v. Delta Special School Dist. No. 2*, 86 F.3d 1489, 1494 (8th Cir. 1996) (citing *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993)). This burden-shifting paradigm is well-established. First, the plaintiff must establish a *prima facie* case of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Texas Dept. of Cmmty. Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). If the plaintiff meets this burden, the burden shifts to the defendant employer to "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Burdine*, 450 U.S. at 254. If the defendant meets this burden, "the *McDonnell Douglas* framework—with its presumptions and burdens"—disappears. *St. Mary's Honor Center*, 509 U.S. at 510. Still, "the plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.' *Burdine*, *supra*, at 256, 101 S.Ct. 1089. Moreover, although the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, *St. Mary's Honor Center*, *supra*, at 511,

113 S. Ct. 2742, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual,' *Burdine*, *supra*, at 255, n. 10, 101 S. Ct. 1089." *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 143 (2000).

Here, Uni-Select attempts to meet its burden under this analytical framework by asserting that the positions Bergdale unsuccessfully sought were filled by the most qualified individuals. Bergdale contends that she was the most qualified and, as evidence, offers her own résumé, as well as the résumés of the individuals who filled the receptionist positions. "[A] comparison that reveals that the plaintiff was only similarly qualified or not as qualified as the selected candidate would not raise an inference of . . . discrimination." *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 864 (8th Cir. 1997). Here, a comparison illustrates that Bergdale had significantly more experience than the individuals hired as receptionists. Furthermore, Bergdale also offers proof that Uni-Select hired temporary employees to perform work that would have been within Bergdale's physical restrictions. In addition, she offers evidence that Uni-Select altered the results of the typing tests, which were given to the receptionist position applicants.

Uni-Select, on the other hand, offers no proof other than its conclusory argument that Bergdale was not the most qualified. There are genuine issues of material fact as to whether Uni-Select's proffered reasons were merely a pretext for retaliatory conduct. On the present record, a jury question is presented on Bergdale's claims that she was constructively discharged and denied reasonable accommodation in retaliation for filing discrimination charges. Therefore, Uni-Select's motion for summary judgment on this claim will be denied.

E. Preemption

The last issue requiring this court's consideration is whether Bergdale's common-law

claim of wrongful discharge is preempted by her statutory discrimination claims. Because plaintiff's disability discrimination claims and wrongful discharge claim require a showing of an "adverse employment action," Uni-Select argues that the common-law wrongful discharge claim is preempted. [Deft.'s Br., at 11, citing *Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 38 (Iowa 1993) ("[A]lternative claims . . . are preempted if . . . [the employee] must prove discrimination to be successful in them.")]. This court previously addressed this identical argument in *Richards v. Farner-Bocken Co.*, 145 F. Supp. 2d 978, 990-91 (N.D. Iowa 2001).

In *Richards*, this court stated that "[p]reemption occurs unless the claims are separate and independent, and therefore incidental, causes of action. *Greenland* [*v. Fairtron Corp.*], 500 N.W.2d [36,] 38 [(Iowa 1993)]; *Grahek*, 473 N.W.2d at 34; *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 639 (Iowa 1990). The claims are not separate and independent when, under the facts of the case, success on the claim not brought under chapter 216 requires proof of discrimination. *Greenland*, 500 N.W.2d at 38." *Richards*, 145 F. Supp. 2d at 990. Here, as in *Richards*, Bergdale's wrongful discharge claim does not involve a showing of discrimination. Therefore, her common-law wrongful discharge claim is separate and independent and not preempted by her disability discrimination charges. *See id.* The court, therefore, will deny Uni-Select's motion for summary judgment with respect to its claim that Bergdale's wrongful discharge claim is preempted by her statutory discrimination claims.

III. CONCLUSION

Because the court finds that Bergdale has met her burden under Rule 56 and has generated genuine issues of material fact on each of the issues raised by Uni-Select on this motion for summary judgment, the court **denies in its entirety the defendant's motion for summary judgment.**

IT IS SO ORDERED.

DATED this 28th day of May, 2002.

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MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA